

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JACOB ANGELO MASSEY,

Case No.: 3:24-cv-00379-ART-CSD

Plaintiff

Report & Recommendation of U.S. Magistrate Judge

V.

Re: ECF Nos. 1, 1-1, 1-2

MARK B. JACKSON, et al.,

Defendants

This Report and Recommendation is made to the Honorable Anne R. Traum, United District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Plaintiff, who is an inmate in custody of the Nevada Department of Corrections (NDOC),
13 has filed an application to proceed in forma pauperis (IFP) (ECF Nos. 1, 3) for an inmate and pro
14 se complaint (ECF No. 1-1), as well as a motion for appointment of counsel (ECF No. 1-2).

I. IFP APPLICATION

16 A person may be granted permission to proceed IFP if the person “submits an affidavit
17 that includes a statement of all assets such [person] possesses [and] that the person is unable to
18 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
19 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1).

20 The Local Rules of Practice for the District of Nevada provide: "Any person who is
21 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
22 The application must be made on the form provided by the court and must include a financial
23 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

1 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
2 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
3 (quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the
4 benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

5 An inmate submitting an application to proceed IFP must also “submit a certificate from
6 the institution certifying the amount of funds currently held in the applicant’s trust account at the
7 institution and the net deposits in the applicant’s account for the six months prior to the date of
8 submission of the application.” LSR 1-2; *see also* 28 U.S.C. § 1915(a)(2). If the inmate has been
9 at the institution for less than six months, “the certificate must show the account’s activity for
10 this shortened period.” LSR 1-2.

11 If a prisoner brings a civil action IFP, the prisoner is still required to pay the full amount
12 of the filing fee. 28 U.S.C. § 1915(b)(1). The court will assess and collect (when funds exist) an
13 initial partial filing fee that is calculated as 20 percent of the greater of the average monthly
14 deposits or the average monthly balance for the six-month period immediately preceding the
15 filing of the complaint. 28 U.S.C. § 1915(b)(1)(A)-(B). After the initial partial filing fee is paid,
16 the prisoner is required to make monthly payments equal to 20 percent of the preceding month’s
17 income credited to the prisoner’s account. 28 U.S.C. § 1915(b)(2). The agency that has custody
18 of the prisoner will forward payments from the prisoner’s account to the court clerk each time
19 the account exceeds \$10 until the filing fees are paid. 28 U.S.C. § 1915(b)(2).

20 Plaintiff’s certified account statement indicates that his average monthly balance for the
21 last six months was \$2.84, and his average monthly deposits were \$16.67.

22 Plaintiff’s application to proceed IFP should be granted. Plaintiff should be required to
23 pay an initial partial filing fee in the amount of \$3.33 (20% of \$16.67); thereafter, whenever his

1 prison account exceeds \$10, he must make monthly payments in the amount of 20 percent of the
 2 preceding month's income credited to his account until the \$350 filing fee is paid.

3 **II. SCREENING**

4 **A. Standard**

5 Under the statute governing IFP proceedings, "the court shall dismiss the case at any time
 6 if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal--
 7 (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii)
 8 seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C.
 9 § 1915(e)(2)(A), (B)(i)-(iii).

10 In addition, under 28 U.S.C. § 1915A, "[t]he court shall review, before docketing, if
 11 feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in
 12 which a prisoner seeks redress from a governmental entity or officer or employee of a
 13 governmental entity." 28 U.S.C. § 1915A(a). In conducting this review, the court "shall identify
 14 cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--
 15 (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks
 16 monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b)(1)-(2).

17 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
 18 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) and
 19 28 U.S.C. § 1915A(b)(1) track that language. As such, when reviewing the adequacy of a
 20 complaint under these statutes, the court applies the same standard as is applied under Rule
 21 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Review under Rule
 22 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232
 23 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
3 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
4 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
5 (1980) (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
7 action," it must contain factual allegations sufficient to "raise a right to relief above the
8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
9 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
10 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
11 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
12 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff's complaint checks the box indicating he is proceeding under 42 U.S.C. § 1983.
19 He names as defendants Douglas County District Attorney (DA) Mark B. Jackson, Douglas
20 County Assistant District Attorney (ADA) Nathaniel Smith, Douglas County ADA James Sibley,
21 Douglas County District Court Judge Thomas Gregory, and Douglas County District Court
22 Judge Todd Young.

1 Plaintiff asserts that he was arrested in 2022 for felony domestic violence charges. He
2 alleges that the District Attorney “spliced and edited” four different 911 calls to create false
3 evidence, and in addition, the witness statements disappeared. He asserts the case resulted in a
4 mistrial and was dismissed with prejudice on May 14, 2024, as a result of prosecutorial
5 misconduct (Case 2022-CR-00206). Plaintiff asserts that ADA Smith was forced to resign, and
6 he is now a District Attorney in Lyon County.

7 Plaintiff goes on to assert that Judge Gregory recused to allow Judge Young to hear the
8 case in 2024-CR-00068 under Nevada Revised Statute (NRS) 199.335¹, and Young sent Plaintiff
9 to prison. He avers that Judge Gregory denied him a continuance and forced Plaintiff to go to
10 trial without time to prepare or review the evidence.

11 Plaintiff asserts that his rights were violated under the Sixth, Twelfth, and First
12 Amendments. He requests that all of this be made public, and for District Attorney Jackson to
13 explain the actions of the State, and to be compensated for them taking “over a year of my life
14 and counting.”

15 First, Plaintiff sues Judges Gregory and Young for conduct undertaken in connection
16 with his criminal proceedings. Judges are absolutely immune for acts performed in their official
17 capacity in connection with his criminal proceedings. *See In re Castillo*, 297 F.3d 940, 947 (9th
18 Cir. 2002). Therefore, Plaintiffs claims against Judges Gregory and Young should be dismissed
19 with prejudice.

20 Second, Plaintiff sues Deputy District Attorneys concerning their involvement in his
21 criminal proceedings and the alleged falsification of evidence. State prosecutors are absolutely
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23 ¹ NRS 199.335 is Nevada’s law making it a crime for a defendant in a criminal case to fail to appear for a required court proceeding.

1 immune from section 1983 actions when performing functions "intimately associated with the
2 judicial phase of the criminal process" or phrased differently, "when performing the traditional
3 functions of an advocate." *Garmon v. County of Los Angeles*, 828 F.3d 837, 842 (9th Cir. 2016)
4 (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Kalina v. Fletcher*, 522 U.S. 118, 131
5 (1997)). Therefore, Plaintiff's claims against ADA Smith and ADA Sibley should be dismissed
6 with prejudice.

7 Plaintiff also names Douglas County DA Mark Jackson, but there are no allegations
8 pertaining specifically to Jackson. Instead, Plaintiff's allegations focus on the conduct of the
9 ADAs assigned to prosecute his criminal cases. To the extent Plaintiff is suing DA Mark Jackson
10 as the supervisor of ADAs Smith and Sibley, DA Jackson is also absolutely immune from suit.
11 *Garmon*, 828 F.3d at 845 (citing *Van de Kamp v. Goldstein*, 555 U.S. 335, 345-46 (2009))
12 (attorney supervising trial prosecutor who is absolutely immune is also absolutely immune).
13 Therefore, DA Mark Jackson should also be dismissed with prejudice.

14 Finally, the court notes that Plaintiff has pursued this action pursuant to 42 U.S.C. §
15 1983. If, however, Plaintiff is actually trying to assert a Sixth Amendment claim of ineffective
16 assistance of counsel, such a claim must be raised in a direct criminal appeal, post-conviction, or
17 habeas proceeding, and not in a section 1983 action. Claims for ineffective assistance of counsel
18 are not recognized under Section 1983, despite the statute's "literal applicability" to the Sixth
19 Amendment, because specific appellate and habeas statutes apply. *See Nelson v. Campbell*, 541
20 U.S. 637, 643 (2004). Nevada state prisoners must initially seek post-conviction relief in state
21 court. *See Morgano v. Smith*, 879 P.2d 735 n. 3, 110 Nev. 1025 (1994) (where a claim is "based
22 primarily on the ineffective assistance of counsel, post-conviction proceedings, rather than civil
23 proceedings, provide such litigants a more appropriate forum to present their claims"). Nevada

1 law provides that a claim for ineffective assistance of counsel must first be raised on direct
2 appeal of a conviction. See Nev. Rev. Stat. 34.810(1)(b). Nevada also provides habeas relief for
3 ineffective assistance of counsel claims. *See* Nev. Rev. Stat. 34.720, *et. seq.*. Where a state
4 habeas remedy is available, a plaintiff cannot seek federal habeas relief until he has first sought
5 and been denied habeas relief in state courts. *Preiser v. Rodriguez*, 411 U.S. 475, 477 (1973); 28
6 U.S.C. §§ 2241-66.

7 If this is the case, Plaintiff should file a notice with the court indicating that he is seeking
8 to pursue relief in a habeas petition.

9 III. CONCLUSION

10 (1) Plaintiff's IFP application (ECF No. 1) should be **GRANTED**; however, within **30**
11 **DAYS** of the date of any order adopting this Report and Recommendation, Plaintiff should be
12 required to pay, through NDOC, an initial partial filing fee in the amount of \$3.33. Thereafter,
13 whenever his prison account exceeds \$10, he is required to make monthly payments in the
14 amount of 20 percent of the preceding month's income credited to his account until the full \$350
15 filing fee is paid. This is required even if the action is dismissed, or is otherwise unsuccessful.
16 The Clerk must **SEND** a copy of this Order to the attention of **Chief of Inmate Services for the**
17 **Nevada Department of Corrections** at formapauperis@doc.nv.gov.

18 (2) The Clerk should be directed to **FILE** the complaint (ECF No. 1-1).

19 (3) The Complaint should be **DISMISSED WITH PREJUDICE**.

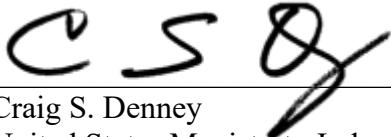
20 (4) Plaintiff's motion for appointment of counsel (ECF No. 1-2) should be **DENIED AS**
21 **MOOT**.

22 Plaintiff should be aware of the following:

1 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
2 this Report and Recommendation within fourteen days of being served with a copy of the Report
3 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
4 Report and Recommendation” and should be accompanied by points and authorities for
5 consideration by the district judge.

6 2. That this Report and Recommendation is not an appealable order and that any notice of
7 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
8 until entry of judgment by the district court.

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11 Dated: September 16, 2024

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13 Craig S. Denney
United States Magistrate Judge

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